

City Administrator's Office Guidance on Chapter 12X

Dated: September 26, 2022

This Guidance Memo supersedes the 12X Guidance Memo dated November 27, 2019.

This memorandum is intended to update and replace the City Administrator's previous 2019 memorandum. All relevant information should be contained in this 2022 memorandum. However, the information given in the 2019 memorandum is still accurate, but only to the extent that it does not conflict with the information presented here.

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Section 1. Overview of Chapter 12X: Contracting Ban versus Travel Ban

[Administrative Code Chapter 12X](#) restricts City spending as it relates to contracting with entities headquartered in certain states (Contracting Ban), as well as traveling to those states (Travel Ban). For the purpose of 12X, the term Contract includes Purchase Orders and Direct Vouchers.

12X rules pertaining to the Contracting Ban and the Travel Ban are not identical and governed by different sections of 12X. Analysis under one section is not determinative of analysis under the other. This memo gives examples of transactions that fall under both the travel and contracting bans.

Section 2. List of States Subject to 12X

12X restricts City contracting with and travel to States whose laws:

- (A) Perpetuate discrimination against LGBTQ people (12X Article 1);
- (B) Prohibit abortion prior to the viability of the fetus (12X Article 2); and/or
- (C) Restrict or suppress voting rights (12X Article 3).

States subject to 12X are collectively referred to as Covered States. The Covered State List is reviewed on a semiannual basis, in consultation with the Office of Transgender Initiatives, Department on the Status of Women, and Department of Elections. The Covered State List is maintained by the City Administrator's Office and available at <https://sf.gov/resource/2021/states-where-city-will-not-fund-travel-or-do-business>. A searchable version of the list can be found at: <https://sfgov.org/oca/request-waive-12x-requirements>. This list is updated semi-annually.

Section 3. 12X Contracting Ban

3.01 What Types of Contracts are Subject to the 12X Contracting Ban?

The 12X Contracting Ban applies only to contracts, purchase orders and direct vouchers issued pursuant to Chapter 6 (Public Works/Construction) and Chapter 21 (Commodities, General Services, and Professional Services). Before applying Chapter 12X, you must determine if the contract, expense or payment pertains to an activity covered by either Chapter 6 or Chapter 21. For example, memberships, conference dues and regulatory fees are unlikely to be covered by Chapter 6 or Chapter 21 because they are not generally considered Construction under Chapter 6 nor Commodities, General Services or Professional Services under Chapter 21.

- To determine if your transaction meets the definition of a Commodities Contract, General Services Contract or Professional Services Contract under Chapter 21, review [CHAPTER 21: ACQUISITION OF COMMODITIES AND SERVICES \(amlegal.com\)](#).
- To determine if your transaction meets the definition of a Construction Contract under Chapter 6, review [CHAPTER 6: PUBLIC WORKS CONTRACTING POLICIES AND PROCEDURES \(amlegal.com\)](#).

3.02 What Types of Contracts are Exempt From the 12X Contracting Ban?

The 12X Contracting Ban does not apply to all Contracts. If a Contract is not subject to the 12X Contracting Ban, it is considered exempt from the 12X Contracting Ban. The following types of contracts and transactions are exempt from the 12X Contracting Ban:

1) Chapter 21G and Chapter 23 Agreements:

The 12X Contracting Ban applies to contracts and transactions completed under Chapters 21 and 6 only. Therefore, agreements entered into under Chapter 21G (Grants) and Chapter 23 (Property Contracts) are exempt from 12X because they do not meet the definition of Contract under 12X.

2) Employee Expenses and Reimbursements:

Employee reimbursements are not subject to 12X Contracting Ban because the transaction is between City and an employee, not between City and a Contractor.

3) Contracts Advertised, Solicited or Initiated prior to the Applicable Article's Operative Date:

The 12X Contracting Ban does not apply to contracts advertised, solicited, or initiated (if there was no solicitation) prior to the Operative Date of the applicable 12X Article(s). The Operative Date is the date on which each 12X Article went into effect, not the date on which a State was added to that Article's list. Because states can be added or removed from each Article semi-annually, a contract's Operative Date exemption status can also change semi-annually. Given the complexity around determining a contract's Operative Date exemption status, the City Administrator's Office (ADMO) has developed a tool by which departments can quickly see if their contract is exempt from 12X. The tool can be accessed here: [Chapter 12X State List \(incl. guidance on pre-operative date\)](#) under the red tab entitled "Is My Contract Exempt from 12X".

4) Contracts for the Investment of Trust Money:

The 12X Contracting Ban does not apply to contracts for the investment of trust money or relating to the management of trust assets, agreements to invest City moneys in U.S. government securities, or agreements for the investment, deposit, or safekeeping of City moneys, where the Treasurer, as a fiduciary of the City, determines that entering into the agreement is in the interest of soundly investing public assets are all explicitly exempt from 12X.

5) Contracts for Underwriting Services:

The 12X Contracting Ban does not apply to contracts entered into for underwriting services for the purchase and sale of City bonds, notes, and other forms of indebtedness are explicitly exempt from 12X.

3.03 How to Waive the Requirements of the 12X Contracting Ban for Contracts Subject to 12X

If a contract is not exempt from the 12X Contracting Ban, City departments may seek to waive the requirements of the 12X Contracting Ban for reasons shown below. A waiver will also be required for any subsequent amendments, novation or assignment of that contract.¹ Below are the types of waiver justifications departments may seek when requesting to waive the requirements of the 12X Contracting Ban:

1. Sole Source
2. Declared Emergency
3. Only One Responsive Contractor
4. Adverse Impact/Substantial Interest
5. Bulk Purchasing (i.e., Piggybacking)

¹ See 12X.5(b)(1) - 12X.5(b)(7), 12X.15(b)(1)- 12X.15(b)(7), and 12X.26(b)(1) - 12X.26(b)(27).

- 6. Conflicting Grant Terms
- 7. SFPUC Bulk Water, Power and Gas

3.04 How to Document Contracts Exempt from 12X and 12X Contracting Ban Waivers.

1) Documenting Contracts Exempt from the 12X Contracting Ban.

- **ServiceNow:** Effective August 2022, Departments are no longer required to justify their exemptions in ServiceNow which is now limited to requests to waive the requirements of the 12X Contracting Ban. If a Contract is deemed exempt from the 12X Contracting Ban, it is not subject to the 12X Contracting Ban and, as such, there is nothing to waive. Since there is nothing to waive, a submission in ServiceNow is also not required.
- **PeopleSoft:** Regardless of whether the transaction is or is not exempt from 12X, PeopleSoft requires Departments to select an exception code for any PO or Contract issued to a Supplier HQ'd in a Covered State. If the Contract is exempt from 12X, select the following exception code in PS:

Choose an authorized exception below to proceed:

- Needed Services are available only from one source
- Contract is necessary to respond to an emergency
- There are no qualified responsive bidders or prospective bidders that comply with the requirements of 12X and the contract is providing essential services.
- The public's interest warrants granting an exception to 12X because its application would have an adverse impact on services.
- The public's interest overrides 12X because its application would have a substantial adverse financial impact on the city.
- Services to be purchased are available under a bulk purchasing agreement
- Complying with 12X would violate the terms of grants, subvention or agreement with a public agency.

This is an agreement or amendment that is exempt pursuant to the legislation (Pre 12X Operative Date, Investment Services, Underwriting Services, City as Grantor, NOT Goods/Services under Chapter 21 and 6 of the Administrative code). For guidance regarding exemptions, contact OCA.

2) Documenting Contracts for Which a 12X Contracting Ban Waiver is Sought.

- **ServiceNow:** Departments can request to waive the 12X Contracting Ban through ServiceNow. The request will be routed to the Department's Department Head or authorized designee for approval. *The request must provide the Department's written justification for its request.* Once approved, a copy will be sent to the Requester and the City Administrator.
 - [Create New 12X Waiver Request](#)
 - [12X Waivers User Guide](#)
- **PeopleSoft:** PeopleSoft requires Departments to select an exception code for any PO or Contract issued to a Supplier HQ'd in a Covered State. To do this, the department will select the applicable 12X waiver exception code in PeopleSoft and upload a copy of the approved ServiceNow submission to PeopleSoft.

3.05 Are Exempt Contracts Also Exempt from the 12X Travel Ban?

No. Even if a contract or transaction is exempt from the 12X Contracting Ban, **travel** performed as part of that contract or transaction may still be subject to the 12X Travel Ban. For example:

- **Scenario 1:** *City enters into a contract with a company HQ'd in CA and, therefore, not subject to 12X. However, if the contractor must travel to a 12X State, the travel-related expenses incurred by the contractor are only permissible after the contractor's travel has been evaluated under the 12X Travel Ban to determine if it is permissible.*
- **Scenario 2:** *Chapter 21G grants are not subject to 12X. However, if the grantee must travel to a 12X State, the travel-related expenses incurred by the grantee are only permissible after the grantee's travel has been evaluated under the 12X Travel Ban to determine if it is permissible.*

- **Scenario 3:** *Employee reimbursements do not meet the definition of a Contract under the 12X Contracting Ban. Therefore, they are not subject to the 12X Contracting Ban. However, if the employee expense was incurred because the employee attended a conference in a 12X State, the travel-related expenses incurred by the employee are only permissible after the employee’s travel has been evaluated under the 12X Travel Ban to determine if it is permissible.*

In each example above, the contract or transaction is not subject to the 12X Contracting Ban but is subject to the 12X Travel Ban.

Section 4. 12X Travel Ban

4.01 What is the 12X Travel Ban?

Unless exempted for reasons set forth in the following section, the City shall not approve a request for City-funded travel to Covered States. When travel is not deemed exempt from the 12X Travel Ban, the 12X Travel Ban requirements cannot be waived under any circumstances. All expenses related to such travel are also prohibited regardless of payment method (Purchase Order, Contract, Direct Voucher or Employee Reimbursement).

4.02 What Types of Travel Are Exempt from the 12X Travel Ban?

If a Department Head determines that travel by an employee, contractor or grantee to a Covered State falls into one or more categories below, the travel is deemed exempt and, therefore, not subject to the 12X Travel Ban.

1. Travel that is necessary for the enforcement of any state or City law.
2. Travel that is necessary for the defense of any legal claim against the City.
3. Travel that is required by law.
4. Travel that is required to meet contractual obligations incurred by the City.²
5. Travel that is necessary for the protection of public health, welfare, or safety.
6. Where the funding source prohibits City from applying the 12X Travel Ban (e.g., Federal Funds).

Additionally, travel that requires landing in a state by plane to make a connecting flight to a destination outside that state, or traversing a state by automobile, train, bus, or otherwise, to reach a destination outside that state is exempt from the 12X Travel Ban.

4.03 How to Document Travel Deemed Exempt from the 12X Travel Ban.

When travel is deemed exempt from the 12X Travel Ban, all expenses related to that travel can be paid by City, regardless of payment method (Purchase Order, Contract, Direct Voucher or Employee Reimbursement) or funding source. Also, because the travel is deemed exempt from the 12X Travel Ban, departments are not required to obtain a waiver from the 12X Travel Ban.

1) Step 1: Document the 12X Travel Expenses Based on Expense Type.

- a) **Travel-Related Employee Reimbursements:** As explained in Section 3.02, Employee Reimbursements are exempt from the 12X Contracting Ban because they do not meet 12X’s definition of a Contract. However, an Employee Reimbursement that is not subject to the

² Departments may not deliberately draft scopes of services in contracts in a manner to circumvent the travel related restrictions of 12X.

12X *Contracting* Ban may be subject to the 12X *Travel* Ban if it is related to travel to a Covered State. As such, while a 12X Contracting Ban waiver in ServiceNow will not be required, Departments must still determine if the travel is exempt under the 12X Travel Ban (and, therefore, permissible).

b) Travel-Related POs/Contracts/Payments made to an Entity Not HQ'd in a Covered State:

If a travel-related PO/Contract/Payment is issued to an entity not headquartered in a Covered State, the transaction is not subject to the 12X Contracting Ban. However, a PO/Contract/Payment not subject to the 12x Contracting Ban may still be subject to the 12X Travel Ban if it is related to travel to a Covered State. As such, while a 12X Contracting Ban waiver in ServiceNow will not be required, Departments must still determine if the travel is exempt under the 12X Travel Ban (and, therefore, permissible).

c) Travel-Related POs/Contracts/Payments made to an Entity that Is HQ'd in a Covered State:

If a travel-related PO/Contract/Payment is made to an entity headquartered in a Covered State, the transaction is subject to both the 12X Contracting Ban and the 12X Travel Ban. This means:

- i. **ServiceNow:** Because the PO/Contract/Payment is also subject to the 12X Contracting Ban, the department must submit a request to waive the 12X Contracting Ban for the transaction in ServiceNow.
 - a. [Create New 12X Waiver Request](#)
 - b. [12X Waivers User Guide](#)
- ii. **PeopleSoft:** Because the transaction is also subject to the 12X Contracting Ban, the Department will have to select the applicable waiver code in PeopleSoft and upload a copy of the approved ServiceNow submission.

Section 5. Other Considerations

5.01 How to Determine a Supplier's Headquarters.

12X applies solely to Suppliers whose HQs are in the United States. Suppliers whose HQs are not in the United States are not subject to 12X. Each Supplier's HQ can be found in PeopleSoft under the Supplier's profile. The HQ is self-reported. Departments may accept the stated HQ unless they have cause to believe it is inaccurate. For the purposes of 12X, United States headquarters is the corporation's principal place of business in the United States, which is the location where the corporation's officers direct, control, and coordinate the corporation's activities in the United States. This is commonly referred to as the "nerve center" of a corporation. Should a Department seek to challenge a Supplier's self-reported HQ, it should seek the assistance of its Deputy City Attorney before making any determination.

5.02 What is the Significance of a Parent and Subsidiary Relationship?

12X pertains to the HQ of the entity with whom City is transacting, *not the HQ of its parent and/or subsidiaries*.

5.03 How to Evaluate a Supplier's 12X Status When Conducting a Solicitation.

Departments should never exclude Suppliers from a solicitation because they are HQ'd in a 12X Covered State. Suppliers have until the time of contract execution to become compliant with 12X (i.e. move their HQ to a non-12X state). Additionally, even if a Supplier is HQ'd in a banned state, they may still be eligible to work with the City based on one or more applicable 12X waiver justifications.

If the Lowest Responsive Bidder/Highest Ranked Responsive Proposer is HQ'd in a 12X state, the department must first determine if it will seek a waiver to move forward with that Supplier. If the department elects not to do so, it must inform the Supplier of its decision. **A department's decision to not seek a waiver to accept the Lowest Responsive Bid or the Highest Rank Proposal does NOT mean the Proposer or Bidder is "Non-Responsive."** Rather, the department has elected to not move forward with the 12X HQ'd Proposer or Bidder despite their responsiveness, perhaps because the next Lowest Responsive Bid or Highest Rank Proposal is equally acceptable.

5.04 Can City Employees be Paid their Salary if Working from a 12X Covered State?

Yes. If an employee has been permitted to work remotely from a state that is on the 12X Covered State list, they are permitted to receive their salary. Departments must also adhere to applicable DHR policies.